No. 82-450

Office - Supreme Court, U.S.
FILED
SEP 15 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

LARRY P. CRAMER,

Petitioner,

vs.

TYRONE C. FAHNER, Attorney General of the State of Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

United States Court of Appeals

For the Seventh Circuit

Larry P. Cramer, Petitioner
Fairview Farm
Sidell, Illinois 61876
Petitioner.

In The
SUPREME COURT OF THE UNITED STATES

- - - - - - - -

LARRY P. CRAMER,
Petitioner,

vs.

TYRONE C. FAHNER,
Attorney General
of Illinois,
Respondent.

- - - - - - - -

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

- - - - - - - -

The petitioner, Larry P. Cramer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered June 30, 1982, rehearing denied August 13, 1982.

QUESTIONS PRESENTED

1. Whether the petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to represent the State's evidence.

2. Whether the petitioner was denied due process of law and his rights under the Sixth Amendment where the indictment allowed the petitioner to be convicted upon the basis of facts never presented to the grand jury and thus not part of the crime charged.

3. Whether the petitioner's right to confrontation was abridged where the State concealed the address of a key witness who testified under an alias.

TABLE OF CONTENTS

	Page
Prayer	1
Questions presented	2
Table of contents	3
Table of authorities	4
Reports of the case in lower courts	6
Jurisdictional statement	6
Constitutional and statutory provisions	7
Statement of the case	8
Reasons for granting the writ	12
APPENDIX ff.	27
Opinion - Illinois Appellate Court	A1
Judgment - state trial court	A11
Judgment - district court	A13
Supplemental opinion - district court	A24
Judgment - Court of Appeals	A26
Order denying rehearing	A26
Opinion - Court of Appeals	A27

TABLE OF AUTHORITIES

Cases

Alford v. United States, 282 U.S. 218 (1930).

Birtch v. Hunter, 158 F.2d 134 (10th Cir. 1946), cert. denied, 331 U. S. 825 (1947).

Chipman v. Mercer, 628 F.2d 528 (9th Cir. 1980).

Choung v. California, 320 F. Supp. 625 (1970).

Cramer v. United States, 325 U.S. 1 (1945).

Clay v. United States, 403 U.S. 698 (1970).

Cole v. Arkansas, 333 U.S. 196 (1948).

Dalton v. Hunter, 174 F.2d 576 (9th Cir. 1949), cert. denied, 338 U.S. 906 (1949).

Davis v. Alaska, 415 U.S. 308 (1974).

Dawes v. Gough, 170 F.2d 396 (5th Cir. 1948).

In re Cardwell, 256 F.2d 576 (9th Cir. 1958).

Mitchell v. Hunter, 152 F.2d 959 (10th Cir. 1946), cert. denied 328 U.S. 860 (1946).

Parker v. Gladden, 385 U.S. 363 (1966).

People v. Cramer, 64 Ill.App.3d 688, 381 N.E.2d 827 (1978).

People ex rel. Tobe v. Bensinger, 492 F.2d 232 (7th Cir. 1974).

Presnell v. Georgia, 439 U.S. 14 (1978).

Russell v. United States, 369 U.S. 749 (1962).

Smith v. Illinois, 390 U.S. 129 (1968).

Stirone v. United States, 361 U.S. 212 (1960).

Street v. New York, 394 U.S. 576 (1969).

Stromberg v. California, 283 U.S. 359 (1931).

Sykes v. Sanford, 150 F.2d 205 (5th Cir. 1945), cert. denied, 326 U.S. 783 (1946).

United States v. Bohonus, 628 F.2d 1167 (9th Cir. 1980).

United States v. Brandt, 196 F.2d 653 (2d Cir. 1952).

United States v. Cecil, 608 F.2d 1294 (9th Cir. 1979).

United States v. Contreras, 463 F.2d 773 (9th Cir. 1979).

United States v. DeStefano, 476 F.2d 324 (7th Cir. 1973).

United States v. Diamond, 430 F.2d 688 (1970).

United States v. Driscoll, 449 F.2d 894 (1971).

United States v. Flannery, 451 F.2d 773 (9th Cir. 1971).

United States v. Harris, 391 F.2d 348 (6th Cir. 1968), cert. denied 393 U.S. 874.

United States v. Porter, 396 F.2d 270 (6th Cir. 1967).

United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

United States v. Seawall, 550 F.2d 1159 (1977).

United States v. Smith, 399 F.2d 896 (6th Cir. 1968).

United States v. Williams, 447 F.2d 894 (5th Cir. 1971).

United States ex rel. Annuziato v. Manson, 425 F.2d 425 F. Supp. 1272 (D. Conn. 1977), affd Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977).

Williams v. North Carolina, 317 U.S. 287 (1942).

Yates v. United States, 354 U.S. 298 (1957).

Statutes

Ill. Rev. Stat., Ch. 38, sec. 8-1.

Constitutional provisions

Constitution of the United States, Amendments VI, XIV.

REPORTS OF THE CASE IN THE LOWER COURTS

This case was decided on direct appeal in People v. Cramer, 64 Ill.App.3d 688, 381 N.E.2d 827 (1978). The district court issued a written opinion in case number 79-2258, United States District Court for the Central District of Illinois, upon the petitioner's application for a writ of habeas corpus. The opinion of the United States Court of Appeals for the Seventh Circuit is in case numbers 80-2545 and 80-2757, but has not been officially published yet. All these opinions are included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1982. A timely petition for rehearing was denied without opinion on August 13, 1982.

Certiorari is sought on the basis of 28 U.S.C. 1254.

STATUTORY PROVISIONS INVOLVED

Ill. Rev. Stat., Ch. 38, § 8-1:

> Solicitation
> (a) Elements of the offense.
> A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense.

Constitution of the United States, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . ..

Constitution of the United States, Amendment XIV

> . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was indicted December 13, 1974, in Champaign County, Illinois, on six general counts of solicitation and four counts of conspiracy to murder his wife.

He was sentenced to concurrent terms of from one to three years on each charge.

The conspiracy conviction was set aside for reasons unrelated to this petition, when the federal district court below granted a writ of habeas corpus as to the conspiracy charge, which was unanimously affirmed by the Court of Appeals upon a review sought by the State.

The solicitation counts alleged the statutory language and pleaded no facts. The petitioner argued that the indictment should have set forth the words used to solicit and that its vagueness left open the possibility that he was convicted on the basis of facts presented at trial but which were never before the grand jury and no part of the charge.

On direct review, this issue was presented and argued but totally avoided by the state reviewing court opinion. Both the district court and the Court of Appeals decided that the indictment did not need to set forth the words used to solicit, but both courts failed to address the heart of the issue - whether the petitioner could have been convicted on the basis of facts never presented to the grand jury.

The State's evidence at trial consisted primarily of four tape recordings of conversations between the petitioner and a co-conspirator accomplice, together with the testimony of that accomplice, with some corroboration from a one-night girlfriend of the accomplice. The defense consisted of the testimony of the alleged victim, the petitioner's wife, who supplied an alibi as to some events and who testified as to the harmonious marital relationship.

Some two hours into their deliberations on April 15, 1975, the jury requested an Illinois road map and a transcript of these tapes. Without notifying or consulting counsel, the court replied to the jury that these items were not in evidence. The jury then requested the tapes and a recorder. After then discussing the matter with the attorneys, the court denied this request.

Deliberations resumed, no more requests were made, but some twenty hours later, the trial court, on its own initiative, summoned the jury to the courtroom, ascertained that they <u>were</u> making progress, then without reference to the jury request the day before, asked: "Would it help, in your opinion, in this case, if you were to hear the tapes played here in the courtroom?" Upon receiving an affirmative response from the jury, the court directed the replay of the tapes and compelled the petitioner to be present. Forty-five minutes later, verdicts of guilty as to both solicitation and conspiracy were returned.

State and federal cases were cited regarding the constitutional infirmity of the procedure utilized in regard to the tapes. The Appellate Court of Illinois found this error, but a majority of the panel were of the opinion that it was harmless because of the "overwhelming" proof of guilt, although the opinion was authored by the dissenting judge.

The district court, on habeas corpus, said that it was a "close question" whether due process was violated by the state trial judge's action, but that although ". . .viewed with grave concern, this court cannot conlude that those actions were a totally unsolicited intrusion . . .."

The majority opinion of the Court of Appeals said that the petitioner had not carried the burden of showing the replaying of the tapes by the trial judge " . . . so confused the jury or intruded on its function as to deny petitioner due process . . .." A dissenting opinion found that the replaying of the tapes was unrelated to the jury's request, could have resulted in the overemphasis on the probative value of the tapes, and could have been construed by the jury as an indication the trial judge wanted them to return a verdict of guilty.

The third issue, concerning the right to confrontation, arose after trial but before sentencing, when counsel for the petitioner learned that a key witness for the prosecution had testified

under an alias, was involved in narcotics use and traffic at the time of her testimony and was impeachable on a variety of matters. The State had not furnished her address despite two court orders to do so, and the State admittedly knew of her narcotics activity.

The trial court denied a new trial, basing his decision not upon the Constitution but upon State discovery rules, although he made a finding that the State should have furnished her address.

In the Appellate Court, the petitioner argued both a violation of Brady and the right to confrontation, but that court did not address the issue.

On habeas corpus, both the district court and the Court of Appeals determined that this evidence would not have changed the outcome of the trial, and was not, therefore, "material" under the Agurs standard, but both courts failed to address the matter of right to confrontation, which was the only aspect of this issue which was even raised in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to re-present the State's evidence.

It may first be noted that federal due process is violated in state criminal proceedings where the trial is unfair by virtue of interferece with the jury, whether the interference comes from a third party, Turner v. Louisiana, 379 U.S. 466 (1965); Parker v. Gladden, 385 U.S. 363 (1966), or from the trial court itself, Jenkins v. United States, 380 U.S. 445 (1965).

Where a trial court has made unwarranted inquiries of the jury, implied that the jury had to decide the case, implied an opinion, summarized the issues without mentioning the defendant's defense, given the dynamite charge improperly, coercion has been found. United States v. Seawall, 550 F.2d 1159 (1977); United States v. Harris, 391 F.2d 348 (6th Cir. 1968), cert. denied 393 U.S. 874; United States v. Williams, 447 F.2d 894 (5th Cir. 1971); United States v. Contreras, 463 F.2d 773 (9th Cir. 1972); United States v. Diamond, 430 F.2d 688 (1970); United States v. Flannery, 451 F.2d 7[illegible] (9th Cir. 1971); United States v. Smith, 399 F.2d 896 (6th Cir. 1968); United States v. Brandt, 196 F.2d 653 (2d Cir. 1952); United States v. Porter, 396 F.2d 270 (6th Cir. 1967).

The replaying of the tape recordings - the sine qua non of the State's case - catapaulted a speedy verdict 45 minutes later.

The trial court asked the jury if it would "help" if they heard the tapes. Rehearing any portion of the trial may have been "help" to the jury. If the court had asked it it would help to have the testimony of the petitioner's wife read to them, the court would have been emphasizing the evidence most helpful to the petitioner and could have led the jury to believe that the court felt the petitioner was innocent. But the court singled out the piece of evidence most helpful to the State, and he did not do it in the context of nor with any reference to the jury's request twenty hours before. What the court did suggested that the court favored a guilty verdict, that the jury should hurry up and decide, and that the tapes were the important part of the case, as was noted in the dissenting opinion in the Court of Appeals.

It is difficult to re-create on paper the drama of that moment when the trial judge staged a re-creation of the crime, as it were, by bringing the jury into an empty courtroom and blaring those tapes over amplifiers. There sat the petitioner and his counsel over their objections, right in front of the jury for scrutinization during the long pauses and delays and periods of silence on the tapes. It would

not be unreasonable to suggest that every fiber of thought from that moment on was concentrated on material on those tapes, and all other evidence in the trial was ignored.

The Court of Appeals majority seized upon the fact that the jury had requested the tapes the day before, shortly after deliberations began. But the trial court in no way indicated he was responding to that request which he had denied, when he inquired as to progress and then he broached the subject of the tapes.

Moreover, if the jury had been given the tapes early in the deliberations, they would have been considered with the testimony, exhibits, instructions, and arguments in the case. But here the jury had had more than twenty hours to consider and discuss those matters. With the trial judge's intervention after the passage of so much time, he focussed the jury's entire attention to the tapes. They became the crux of the deliberations. Further, the judge invested a certain judicial sanctity to the tapes - the court was going to have them played; they would be played in the courtroom. Too, the judge foisted the entire tape evidence on the jury, even though the jury initially may have wanted the transcripts only to find the answer to a single question, or the question giving rise to the initial request might have long before been resolved.

The Court of Appeals majority opined that the fact that the jury was making progess at the time of the trial judge's intervention meant that they were perhaps on the verge of a guilty verdict anyway. That is a totally unwarranted assumption. The record does not reflect how the jury was divided at the time of the judge's intervention. Every trial lawyer has at some time had a case where a jury has flip-flopped from one side to another in a brief time. Illustrative of this is People ex rel. Tobe v. Bensinger, 492 F.2d 232 (7th Cir. 1974), where a jury moved from nine for acquittal to unanimous for guilty after interference by the court.

What the trial judge did in the instant case was so explosive, that it could well have affected the jury in the same fashion as in Tobe.

The length of deliberations themselves point to the fact that this was a case with divided opinions in the minds of the jurors. This court considered a 26-hour deliberation as " . . . indicating a difference among them as to guilt(,)" Parker v. Gladden, 385 U.S. 363 (1966). It was on the delicate balance of this jury, that the trial judge imposed his will, with a surprising interjection: Do you want to hear the tapes again?

Had the jury deliberated another thirty hours after this, it could be argued that the trial judge's conduct had no substantial impact, but the quick verdict minutes later demonstrates the impact.

See United States v. Harris, supra; United States v. Rogers, 289 F.2d 433 (4th Cir. 1961); United States v. Williams, supra.

The Court of Appeals likened this case to the giving of an Allen charge. They then relied upon their own case of United States v. DeStefano, 476 F.2d 324 (7th Cir. 1973), which held that giving an Allen instruction to a non-deadlocked jury was not coercive. The Ninth Circuit has ruled just the opposite. United States v. Contreras, 463 F.2d 773 (9th Cir. 1972).

However, the important difference between this case and cases involving the dynamite charge, regardless of the contrary opinions in the different circuits, is that here the jurors were, in effect, told to re-examine their opinions in light of the tapes, not in light of the views of other jurors.

Certiorari is compelling in this case because it involves at once a universal area of dispute - interchange between court and jury during deliberations - and a unique fact situation. As the Appellate Court opinion noted, no case could be found where the trial judge proffered a review of evidence for the jury. Secondly, there is a conflict between the circuits as pointed out which should be resolved. Further, although this is a state court case, this court by deciding this issue could also give supervisory guidance to the district courts in the area of judge-jury communications during deliberations,

so that nothing as unconscionable as here occurred would likely recur in future cases.

II. The petitioner was denied due process of law and his rights under the Sixth Amendment where the indictment allowed the petitioner to be convicted upon the basis of facts never presented to the grand jury and thus not part of the crime charged.

The Illinois solicitation statute says:

> A person commits solicitation when with intent that an offense be committed, he commands, encourages, or requests another to commit that offense. Ill. Rev. Stat., Ch. 38, sec. 8-1.

Counts IV through IX of the indictment alleged the statutory language, naming Judy Cramer as the victim, murder as the offense solicited sometime between February of 1974 and December 13, 1974, and Charles O. Weathington as the person encouraged or requested. The counts were worded slightly different but did not set out separate incidents or identify the conversations.

Although the scope of federal review of a state court indictment is limited, it may appropriately be reviewed where it is so defective as to deprive the court of juriscition, Dalton v. Hunter, 174 F.2d 633 (10th Cir. 1949), cert. denied, 338 U.S. 906 (1949); Birtch v. Hunter, 158 F.2d

134 (10th Cir. 1946), cert. denied, 331 U.S.825, or plainly does not charge a crime, In re Cardwell, 256 F.2d 576 (9th Cir. 1958); Dawes v. Gough, 170 F.2d 396 (5th Cir. 1948), or is too vague even though in the statutory language. Choung v. California, 320 F. Supp. 625 (1970).

Although this issue was raised on direct appeal, the state court did not address the issue in its opinion, People v. Cramer, 64 Ill.App.3d 688, 381 N.E.2d 827 (1978), thus the rationale for limiting review, namely because it is reviewable on direct appeal, is not applicable. Mitchell v. Hunter, 152 F.2d 959 (10th Cir. 1946), cert. denied, 328 U.S. 860 (1946); Sykes v. Sanford, 150 F.2d 205 (5th Cir. 1945), cert. denied, 326 U.S. 783 (1946).

The cases limiting review of state court indictments on federal habeas corpus are inapplicable here in any event, because it is not the indictment per se that abridges the Constitution, but its vagueness in light of the fact that the trial encompassed many facts which were never before the grand jury. The petitioner has repeatedly raised this issue, but the State has never replied to it, and neither the district court nor the Court of Appeals addressed it.

Comparing the grand jury transcript of the accomplice witness Weathington's testimony (State R. C85-C141) with his trial testimony (State R.

594-1151), reveals that his trial testimony covered many events and alleged conversations with the petitioner over a period of ten months which were never made known to the grand jury, and which, thus, could not have been intended as the charge in the indictment.

Examples of trial testimony concerning alleged conversations between the petitioner and the accomplice which were never presented to the grand jury include: (1) a conversation concerning the use of Weathington's dog to attack Mrs. Cramer (State R. 608-10); (2) a discussion involving Weathington's hiding in Mrs. Cramer's car when she returned home from bowling (State R. 614-15); (3) a conversation concerning a home burglary-murder (State R. 616-17); (4) a conversation in the public defender's office when Weathington was urging the petitioner to "hurry up" (State R. 620-21); a conversation in Weathington's car when he was given twenty dollars by the petitioner (State R. 622); and (6) a conversation July 24, 1974, in which plans were discussed to go search out a possible murder site (State R. 624-26). None of the preceding conversations could have served as the basis for the indictment, since they were not presented to the grand jury. But any one of them could have been used by the trial jury to convict the petitioner.

The petit jury was given carte blanche to look anywhere for solicitation, with no instructions or guidance by the court in what to look at to determine if solicitation occurred. The real possibility exists then that the grand jury could have considered the petitioner's words in conversation "a" to have constituted solicitation; the prosecution could have proceeded on the theory that other words of the petitioner in conversation "b" were the solicitation; the petit jury could have convicted on the basis that words of the petitioner in conversation "c" constituted solicitation; and the trial court could have upheld the verdict in ruling on the post trial motion on the basis of conversation "d".

The averments necessary for a constitutionally valid indictment include a description of the charges sufficient to ensure the defendant "that he is being prosecuted on the basis of facts presented to the grand jury . . ." United States v. Cecil, 608 F.2d 1294 (9th Cir. 1979); United States v. Bohonus, 628 F.2d 1167 (9th Cir. 1980). This court likewise noted that a defendant should not be " . . . convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." Russell v. United States, 369 U.S. 749 (1962). See also Presnell v. Georgia, 439 U.S. 14 (1978); Stirone v. United States, 361 U.S. 212 (1960).

It is impossible to tell from the verdict whether the jury convicted of statements envisioned by the grand jury indictment, statements that would legally constitute solicitation if proved, or legally insufficient statements. This was the fault of the vague and ambiguous indictment which informed neither the petitioner nor the jury "of the nature and cause of the accusation . . .." Constitution of the United States, Amend. VI.

Since it is impossible to tell whether the trial jury relied upon a legitimate or an illegitimate basis for their verdict, the Stromberg doctrine requires the invlidation of the conviction. Stromberg v. California, 283 U.S. 359 (1931); Yates v. United States, 354 U.S. 298 (1957); Street v. New York, 394 U.S. 576 (1968); Cramer v. United States, 325 U.S. 1 (1945); Williams v. North Carolina, 317 U.S. 698 (1970). The court cannot presume a conviction to be based upon a valid ground. Williams, supra.

In the words of Mr. Justice Black:

> It is as much a violation of due process to send an accused to prison following confiction of a charge on which he was never tried as it would be to convict him upon a charge that was never made . . .." Cole v. Arkansas, 333 U.S. 196 (1948).

Not only was there a denial of due process in a very basic way at trial, and a denial of appellate review, but to the extent that the Court of

Appeals' silence on this issue can be interpreted as contrary to the petitioner's position, it is in conflict with decisions of this court and of the Ninth Circuit cases cited, making certiorari desirable.

III. The petitioner's right to confrontation was abridged where the State concealed the address of a key witness who testified under an alias.

The State's second most important witness, "Patty Cozad," was used by the State to corroborate accomplice witness Weathington's account of traveling to Chicago, there making several trips to the Palmer House, buying a knife, taking a gun, in September of 1974, all part of a plan to slay Mrs. Cramer. Cozad did not testify, however, that she was an eyewitness to any solicitation.

Yet, her testimony was especially crucial, since Weathington desperately needed someone to lend an air of credibility to his testimony, in light of his impeachment - three pending felony charges, conviction of other crimes, inconsistent statements, a judicial admission of perjury, and his not having been charged as a co-conspirator in the instant case. Her testimony was also important because it dealt with the only instance in this ten-month saga where Mrs. Cramer may have been in any peril.

Cozad's background came to light when she was arrested following the petitioner's trial. Her real name was Patlynn Stafford. Prior to trial the State never furnished the petitioner with her address despite two court orders to do so, yet they interviewed her on four occasions.

Although not critical to this issue, she did have an impeachable background which the State knew about and discussed with her, including: she was an extensive user of narcotics and hallucinogenic drugs, had been for four years, and used drugs from time to time during the period of her trial testimony; at the time of her testimony she had pending in the same court under the Stafford name a felony charge of possession of a controlled substance; and three weeks before the petitioner's trial she sold narcotics in the same county to an Illinois Bureau of Investigation agent, under the surveillance of the State's chief investigator in this case, although she was neither charged nor arrested for that sale until several months after the petitioner's trial.

She was foisted upon the jury as an ordinary citizen without motive to fabricate.

The petitioner here contends that the State's concealment of Cozad's real name and her address, taken together with the concealed items relative

to her impeachment, violated the Sixth Amendment's guarantee of the right of confrontation.

If refusal to allow cross-examination of a key witness for bias violates the right to confrontation of a state habeas petitioner, Davis v. Alaska, 415 U.S. 308 (1974), it would seem to follow that a violation of equal or greater magnitude occurs where the prosecution affirmatively acts to prevent a defendant from finding a prosecution witness and learning impeachable facts about that individual. This is so, because if the impeachable facts are known to a defendant they may be brought into the trial in some other way upon occasion.

The Ninth Circuit has gone so far as to say that violation of the confrontation clause requires " . . . reversal if there is any error(,)" and ". . . whether the error was harmless in the particular case is not considered." Chipman v. Mercer, 628 F.2d 528 (9th Cir. 1980).

Alford v. United States, 282 U.S. 687 (1931), held that the refusal of the trial court to permit cross-examination as to the true name or place of residence of a prosecution witness was a violation of the right of confrontation, without even a showing that the cross-examination, if pursued, would have brought out facts discrediting the witness.

Relying on Alford was Smith v. Illinois, 390 U.S. 748 (1968), where the trial court permitted defense counsel to ascertain that "James Jordan," the name he testified under, was not the witness' true name, but refused inquiry as to his real name or his address. This court held that to be a violation of the Sixth and Fourteenth Amendments without a further showing.

Concealment of Cozad's address and her real name was tantamount to concealment of her identity under Alford and Smith. And unlike those two cases, there was demonstrable prejudice, since Cozad could have been impeached. Thus, the violation of the Sixth Amendment is more grievous than in Alford or Smith.

The only reported case the petitioner could find involving this issue was in United States ex rel. Annunziato v. Manson, 425 F.Supp. 1272 (D. Conn. 1977), affd, Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977), where the district court held that a state habeas prisoner was denied the right to confrontation by the failure of the State to disclose exculpatory evidence concerning the bias of a key witness for the prosecution; that denial of the right to effective cross-examination was constitutional error of the first magnitude which no amount of showing of want of prejudice would cure, citing Davis v. Alaska.

The federal courts below analyzed this issue exclusively in terms of the Agurs-Brady standards, not under Davis, despite the fact that this was the only basis urged in the Court of Appeals. The State, in response to the petitioner's request for rehearing, argued that this case had to be decided under Agurs because the right to confrontation could only be abridged by curtailing cross-examination. Other than the Annunziato case, supra, this case appears to be one of first impression, a novel issue.

It is desirable that this court speak to the issue of whether prosecutorial concealment of impeachment information - a common occurrence which leads to many appeals --must be judged under the "material" standard of Agurs or should be judged under the right to confrontation clause.

A defendant is entitled surely to know who is testifying against him, and whether he is prevented from knowing that by the action of the prosecutor or by the trial court should have no constitutional significance. The Sixth Amendment must protect against prosecutorial error as much as it protects against judicial error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Larry P. Cramer
Petitioner
Fairview Farm
Sidell, Illinois 61876
Tel. (217) 288-9474